

MOHD HANAFI RAMLY

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v.

PP

HIGH COURT SABAH & SARAWAK, BINTULU

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JOHN KO WAI SENG JC

[CRIMINAL APPEAL NO: 41A-02-2010 (BTU)]

20 APRIL 2011

**CRIMINAL LAW:** *Penal Code - Section 354 - Outraging modesty - Appeal against conviction and sentence - Evidence of child witness - Competency and corroboration - Whether conviction unsafe - Whether there was misdirection leading to failure of justice - Evidence Act 1950, s. 133A - Criminal Procedure Code, s. 422*

C

**CRIMINAL PROCEDURE:** *Trial - Competence of witness - Child witness - Corroboration - Whether child understood nature of oath - Whether there was misdirection leading to failure of justice - Evidence Act 1950, s. 133A - Criminal Procedure Code, s. 422*

D

**CRIMINAL PROCEDURE:** *Appeal - Conviction and sentence, against - Whether trial judge had considered mandatory requirements of s. 133A Evidence Act 1950 - Whether evidence corroborated - Whether appellate court could interfere with findings of trial judge as to demeanour and veracity of witness - Whether conviction can be set aside*

E

**EVIDENCE:** *Witness - Child witness - Competency - Whether evidence corroborated - Whether child understood nature of oath - Whether unsafe for trial judge to act on uncorroborated evidence of a child - Evidence Act 1950, s. 133A*

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The appellant was convicted by the Magistrate under s. 354 of the Penal Code (1st charge) for having outraged the modesty of the victim (PW5), an eight year old girl, by kissing her on the cheek, but was acquitted of the charge under s. 509 of the Penal Code (2nd charge) for insulting the modesty of PW5 by asking her to take off her clothing and taking photographs of her. The appellant being dissatisfied with the decision of the learned Magistrate had appealed against the conviction and sentence in relation to the 1st charge. The issues that arose for consideration in this appeal were (i) whether the learned Magistrate had followed the requirements of s. 133A Evidence Act 1950 as to the

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A competency of PW5 (ii) whether the appellant could be acquitted of the 1st charge since he was acquitted of the 2nd charge (iii) whether PW5's evidence was corroborated and (iv) whether the learned Magistrate had failed to take into consideration the evidence adduced for the appellant's defence.

B **Held (setting aside conviction, acquitting and discharging appellant):**

C (1) The learned Magistrate had failed to comply with the provisions of s. 133A of the Evidence Act 1950 by conducting an inquiry first or to satisfy herself before deciding whether PW5, a child of tender years, should have given sworn or unsworn evidence. Failure to comply with s. 133A of the Evidence Act 1950 was fatal to the conviction and not curable under s. 422 of the Criminal Procedure Code (*Tajuddin Salleh v. PP*). (paras 17 & 20)

E (2) It is a sound rule and generally accepted in practice not to act on uncorroborated evidence of a child, particularly, in sexual offences. The learned Magistrate had failed to sufficiently warn herself as to the risk of convicting without such independent corroboration in her ruling. Thus, there had been a misdirection which had occasioned to a failure of justice. (paras 25 & 26)

F **Case(s) referred to:**

*Chiu Nang Hong v. PP* [1964] 1 LNS 24 (*refd*)

*Din v. PP* [1964] 1 LNS 33 (*refd*)

*Mohd Yusof Rahmat v. PP* [2009] 2 CLJ 673 CA (*refd*)

*Muharam Anson v. PP* [1980] 1 LNS 137 FC (*refd*)

*PP v. Chan Wai Heng* [2008] 5 CLJ 805 CA (*refd*)

G *R v. Hayes* [1977] 64 Cr App R 194 (*refd*)

*Saludin Surif v. PP* [1997] 3 CLJ 529 CA (*refd*)

*Tajudin Salleh v. PP* [2008] 2 CLJ 745 HC (*refd*)

*Yusaini Mat Adam v. PP* [2000] 1 CLJ 206 HC (*refd*)

H **Legislation referred to:**

Criminal Procedure Code, s. 422

Evidence Act 1950, s. 133A

Penal Code, ss. 354, 509

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*For the appellant - David Kuok; M/s Wong, Orlando Chua & Kuok Advoc* A  
*For the respondent - Hairun Najmi DPP*

*Reported by Kumitha Abdul Majid*

## JUDGMENT

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**John Ko Wai Seng JC:**

[1] The appellant appeals against the decision of the learned Magistrate given on 23 April 2010 at the Magistrate Court, Bintulu whereby the appellant was convicted on the 1st charge under s. 354 of the Penal Code for having on 19 May 2009 at a school in the district of Bintulu, outraged the modesty of the victim C by kissing the victim on the cheek. The appellant was sentenced to three years imprisonment and one stroke of whipping and the sentence was to run concurrently with the sentence in the Criminal Case No. 82-03-2009 (BTU) in the Magistrates' Court, Bintulu. C D

[2] The appellant had been acquitted of the 2nd charge under s. 509 of the Penal Code of insulting the modesty of the victim by asking the same victim to take off her clothing and taking photographs of her. E

[3] The appellant being dissatisfied with the said decision on the 1st charge has appealed against the conviction and sentence. F

### Section 133A Evidence Act 1950 (EA)

[4] The main ground of appeal under Ground 2(f) of the petition of appeal is the competency of victim (PW5) as a witness in regards to PW5's understanding of the oath. G

[5] It is the contention of learned counsel for the appellant that the victim (PW5) being only eight years of age was not subject to a preliminary examination to determine whether she was a competent witness to testify on oath by the court before she was allowed to take the oath. The full extract of the relevant part of the notes of proceedings (NOP) reads as follows (from middle of p. 35 of record of appeal (ROA)): H

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**A** DPP: My next witness, C

PW5C

BC

**B** 8 years old

Sworn and affirm oath in Bahasa Malaysia

Examination in Chief.

**C** DPP: In court we should speak the truth or not?

PW5: I only tell the truth to the court.

DPP: If tell lies what happen?

PW5: I'll be arrested by the police if not telling the truth.

**D**

[6] Learned counsel for the appellant also questioned as to whether PW5 was competent to give evidence by citing the following extract (from pp. 43 and 44 of ROA):

**E** DC: You told the court that Cikgu Hanafi (ie, the Appellant) using a black camera?

PW5: Yes.

DC: But this is not black?

**F**

PW5: This is not a black camera.

DC: So this is not the camera?

PW5: Cikgu Hanafi used this camera.

**G**

DC: But this camera is not black?

PW5: He used this camera.

DC: Even though this is not black?

**H**

PW5: Yes even though this is not black.

[7] Then in re-examination of PW5 (at p. 45 of the ROA), the following transpired:

**I** DPP: Earlier you said camera was black then during cross you said not black. Tell the court which part of the camera is black?

PW5: I do not know

[8] Learned DPP submitted that the victim (PW5)'s failure to be subject to a preliminary inquiry by the trial court to determine the competency of the child witness is legally not mandatory. PW5 appears to appreciate that she has to tell the truth based on his questions (see at p. 35 of the ROA, above extract). Learned DPP had cited the case of *PP v. Chan Wai Heng* [2008] 5 CLJ 805 to support his proposition that a preliminary inquiry to be held by the court to determine the competency of PW5 is not legally mandatory.

[9] The issue here primarily rests with what is the requirement of s. 133A of the EA which reads as follows:

133A. Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code shall be deemed to be a deposition within the meaning of that section:

[10] The Federal Court in the case of *Muharam bin Anson v. PP* [1980] 1 LNS 137 had accepted that when a child of tender years is called to be a witness the procedure is for the court to hold an inquiry to form an opinion if the child understood the nature of the oath to be sworn otherwise the child evidence will be admitted as unsworn evidence.

[11] Compliance according to the case of *Yusaini Mat Adam v. PP* [2000] 1 CLJ 206 with s. 133A EA as KC Vohrah J puts it means that if a witness of tender years is before the court, she (at p. 210):

... ought to have been examined as to whether she had sufficient appreciation of the solemnity of the occasion and the added responsibility of telling the truth over the ordinary duty to tell the truth upon pain of punishment for perjury under s. 14 of the Oaths and Affirmation Act 1949. Only after the sessions court judge had satisfied herself on the above should the child then have proceeded to take an oath or affirmation to tell the truth under the Oaths and Affirmation Act 1949 (see eg, the procedure adopted by the trial judge in *Tham Kai Yau & Ors v. PP* [1976] 1

A LNS 159; [1977] 1 MLJ 174 at 175C). Otherwise the child's evidence should have been taken and reduced in writing following the procedure under s. 133A of the Evidence Act 1950.

B [12] In the *Chan Wai Heng* case (*supra*) cited by learned counsel DPP, the notes of proceedings pertaining to the ascertainment of the child witness before the Sessions Court was set out in full in the judgment of the Court of Appeal from paras 18 to 19 (at pp. 815 to 816 (*ibid*)). The procedure adopted by the sessions judge was acceptable to the Court of Appeal because as observed by Heliliah JCA at para 21 in p. 817:

C It is to be noted that nowhere is there prescribed a specific procedure to be observed in ascertaining the level of a child's understanding.

D [13] In the judgment of Heliliah JCA she concluded from the notes of evidence as set out that (para. 33 at p. 824 (*ibid*)) "the sessions court judge incorporated, as outlined above, a process by which he had formed his own satisfaction that the child witness SP7 in this case did not understand the oath and affirmation." She also noted (from the notes, the examination by the TPR (DPP)) as to the competency of SP7 in which the sessions judge had thereafter concluded and recorded in the notes of evidence that SP7 was sufficiently intelligent and understands the duty of speaking the truth to give unsworn evidence. Heliliah JCA then found (at para. 34 in p. 824 (*ibid*):

F [34] Further to that the following is found in the grounds of judgment of the sessions court judge:

G The victim SP7 was nine years old when he testified in court. He is therefore a child of tender age and as such s. 133A of the Evidence Act 1950 must be followed. I tested SP7 on his ability to understand the nature of the oath and found out that he could not understand it. I then tested him whether he is possessed of sufficient intelligence to justify the reception of the evidence and understand, the duty of speaking the truth through some questions that were posed to him by the learned DPP I found that SP7 was possessed of sufficient intelligence and understood the duty of speaking the truth. Hence, SP7 was allowed to testify and his evidence could be received in court.

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[14] With respect to the submission of learned DPP, the judgment of Heliliah JCA in *Chan Wai Heng* case (*supra*) does not support his proposition that a preliminary inquiry to be held by the court to determine the competency of PW5 is not legally mandatory. Rather, firstly, the sessions judge there did make an express finding that the witness SP7 did not understand the oath in compliance with s. 133A of the EA and thereafter followed by what would be the first issue, checking the competency to be a witness after questioning by the DPP and not by the sessions judge and secondly the accused counsel there appealed on the ground that he was not given an opportunity to take part in the questioning.

[15] This is the decision of the Heliliah JCA *Chan Wai Heng* case (*supra*) at para. 35 at p. 824 & 825 (*ibid*):

[35] It is clear from a scrutiny of the abovementioned paragraphs that the sessions court judge had satisfied himself that the child witness of seven years did not comprehend the oath and thereafter embarked on a process of ascertaining the child's level of understanding. There does not appear to be merit in the contention of the learned counsel for the respondent that in the process of ascertaining the competency of the child it is obligatory that the questions must have been posed by the sessions court judge himself as a prerequisite to the admissibility of the evidence. There was here not a total absence of the inquiry of ascertaining the level of understanding of the child but suggestion that the child must be cross examined, in other words, that there should be conducted a *voire dire*. As indicated above the decision in *Sidek bin Ludan* did not contain that suggestion. We would disagree if it were to be so suggested as it would not reflect the correct approach. Moreover the grounds of judgment and the notes of evidence of the sessions court judge disclosed that he had indeed directed his mind to the requirements of s. 133A before embarking on the process of permitting the prosecution to lead evidence on the acts that were committed on SP7 by the respondent. (emphasis added)

[16] What Heliliah JCA held is that there is no fixed form of holding the inquiry but it is not necessary to hold a *voire dire* (trial within a trial) to ascertain the competency of a child witness to allow defence counsel to cross examine. Nonetheless the *Chan Wai Heng* case (*supra*) accepted the necessity for the court to ascertain the competency of the child witness in order to comply with s. 133A of the EA 1950. *Chan Wai Heng* case (*supra*) had

A distinguished the *Yusaini* case (*supra*) on the ground that in the *Yusaini* there was a total failure in that case by the court in question to take into account s. 133A EA.

B [17] From the extracts of the NOP at ROA at p. 35, it has shown that the learned Magistrate had totally failed to comply with the provisions of s. 133A of the EA by conducting an inquiry first or to satisfy herself before deciding whether PW5 a child of tender years should give sworn or unsworn evidence. The learned Magistrate had totally failed to direct her mind and consider the requirements of s. 133A of the EA. The victim (PW5) of eight years old was put on oath without this enquiry or satisfaction process being conducted by the learned Magistrate as to competency to take the oath and there was no decision made by her as to PW5's competency to give unsworn evidence for the purpose of s. 133A of the EA.

D [18] The facts of this case is on all fours with the facts of the *Yusaini* case (*supra*) where as KG Vohrah J observed:

E Unfortunately in this case neither the learned judge of the Sessions Court nor the DPP nor the counsel who acted for the appellant in the court below appeared to have been aware of s. 133A of the Evidence Act 1950 ...

F [19] The same thing has happened here as can be seen from the extract of the NOP (above), PW5 was put on oath without the learned Magistrate conducting an inquiry or satisfying herself that PW5 before being sworn in according to Bride J in *R v. Hayes* [1977] 64 Cr. App. R 194 at p. 196:

G ... whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal, social conduct.

H [20] In the case of *Tajudin Salleh v. PP* [2008] 2 CLJ 745 it was held that a failure to comply with s. 133A of the EA is fatal to the conviction and not curable under s. 422 of the Criminal Procedure Code.

I [21] The learned Magistrate had failed to direct her mind to the requirements of s. 133A of the EA before PW5 was sworn in and based on the above cited authorities on the failure of the learned

Magistrate to follow the mandatory procedure set by s. 133A of the EA, the conviction should be set aside. Ground 2(f) of the petition of appeal is made out. A

### Acquittal Of The 2nd Charge

[22] Learned counsel for the appellant submitted that if the appellant was acquitted of the 2nd charge for under s. 509 of the Penal Code of insulting the modesty of PW5 by asking her to take off her clothing and taking photographs of her then he should also be acquitted of the 1st charge of outraging her modesty by kissing. B C

[23] With respect to learned counsel for the appellant, the fact that both incident may have been reported to have happened at the same time does not necessarily mean that the acquittal of the charge of insulting modesty by photography would automatically lead to the acquittal of outraging the modesty by kissing. It all boils down to a question of evidence, as even if the event of photography did not happen it does not necessarily mean the other event of kissing did not happen, there is no apparent inconsistency unless the acquittal is based on an alibi defence. D E

[24] Ground 2(d) of the petition of appeal is not made out and fails.

### Corroboration

[25] The other Grounds 2(b) and 2(e) of the petition of appeal will be grouped and considered together. F

1. PW5's evidence can under the circumstances be only be admitted as unsworn evidence, as she appeared from the NOP to understand from having to speak the truth and even if she can comprehend the questions put to her, which has been proved to be questionable. Assuming if that is the case then it is specifically stated in the proviso to s. 133A of the EA that the court cannot rely on her evidence "unless that evidence is corroborated by some other material evidence in support thereof implicating the accused". G H

2. Learned counsel for the appellant submitted that outraging modesty under s. 354 of the Penal Code (PC) is a sexual offence. It is a sound rule and generally accepted in practice I

- A not to act on uncorroborated evidence of a child, particularly,  
in sexual offences. In those circumstances, the learned  
Magistrate should herself of the danger of convicting the  
appellant on the uncorroborated evidence of PW5, and the  
warning must be expressly reflected in the judgment. (see the  
B Privy Counsel's decision in *Chiu Nang Hong v. PP* [1964] 1  
LNS 24; [1964] 1 MLJ 40 at p. 46B)
3. On the need for corroboration in sexual offences, Thomson LP  
in speaking for the Federal Court in *Din v. Public Prosecutor*  
C [1964] 1 LNS 33; [1964] MLJ 300 said that the need for  
corroboration in such cases springs not from the nature of the  
witness but from the nature of the offence and added at  
p. 301H:
- D If, however, she complains of having been raped then both  
prudence and practice demand that her evidence should be  
corroborated.
4. When children are involved, the need for corroboration is  
twofold according to *Mohd Yusof Rahmat v. PP* [2009] 2 CLJ  
E 673, the Court of Appeal said at para. [19] at p. 680D:
- F ... We must not forget that we are here dealing with the  
evidence of a child of tender years who is involved in an  
allegation of rape where even if she is an adult requires  
corroboration because a woman has a temptation to  
exaggerate an act of sexual connection, and for a child of  
tender years for his or her known aptitude to confuse fact  
with fantasy – see *Din v. Public Prosecutor* [1964] 1 LNS  
33. We must distinguish between a statement that should  
be corroborated because of the nature of the offence eg,  
G rape or corruption and that because the tender age of the  
witness. The first requires corroboration because the  
honesty of the witness may be questionable. These offences  
are easy to allege but difficult to disprove. The second  
because of the tender age of the witness who could be  
influenced by adults and his own imagination. The  
H evaluation of evidence in each of the categories must be  
distinguished. Here in this instant case, we are faced with  
both the nature of the offence and tender age of the  
witness. Thus, the probative value of these corroborative  
evidence which were principally former statements by the  
I victim is of little significance.

5. Learned counsel for the appellant submitted that in the present case, there was complete absence of corroboration, in the sense; there is no independent corroboration to implicate the appellant. In other words, there is no corroborative evidence of a cogent and irresistible character. A
  6. The court agrees with the submission of learned counsel for the appellant that viewing in totality of PW5's evidence it demonstrated that her evidence is full of doubt, contradictory and inconsistency based on the illustrations para. 6(a) to (d) of his written submission at pp. 7 to 8. B
  7. PW4 had denied that PW5 ever told her anything about the appellant (at third last line of p. 33 and second line of p. 34 ROA) which contradicted PW5's evidence (middle of p. 40 ROA). It must be noted that PW4 was sworn in as a witness without complying with s. 133A of the EA. The learned Magistrate failed to consider that PW4's denial amounted to a failure of corroboration for PW5's allegation and instead had considered telling PW4 as corroboration (see last paragraph of p. 128 ROA). C
  8. Learned counsel submitted that the learned Magistrate had prejudiced the appellant by using her knowledge in another trial (Criminal Case 82-03-2009 (BTU)) against the appellant involving PW4 to corroborate PW5's evidence (at p. 127 and 128 ROA) in her Ruling: D
- E
- F

Comparing to PW4's evidence given on 27th August 2009 in 82-03-2009 whereby in this present situation, I think is relevant because it involves the same accused, same witnesses, place and time although it was not jointly tried, in that case PW4 evidence corroborated PW5's evidence whereby on 14.05.2009 PW4, PW5, Christie, Tedy, Hillary and Dennison were studying in a night class conducted by the accused. When PW5 gave evidence, she was asked to go to KH room and afterwards go back to class. In PW4's evidence in 82-03-2009, she was asked to go to the KH room after all the students went back to the hostel. It shows that there are corroboration that there is a night class conducted by the accused on 14.05.2009. Further, the fact that PW2 and PW3 was informed by PW4 that PW5 was also disturbed by the accused further corroboration the evidence of PW5 that she only related the incident to PW4. G

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- A The court agrees that such knowledge of the evidence from another trial concerning PW4 should not be used in the proceedings unless and if it can be tendered as evidence by the prosecution and subject to cross examination. It is after all for the prosecution to prove the case against the accused
- B and the court should not partake in using its own knowledge from another case involving the appellant to introduce evidence of corroboration on behalf of the prosecution. This is highly prejudicial and irregular. This is different and distinguishable from imputing the court's own experience on
- C evidence already adduced in court which is acceptable eg, on bad bus service.

In *Saludin Surif v. PP* [1997] 3 CLJ 529 Shaik Daud Ismail JCA had held at p. 536f:

- D ... it is trite law that inadmissible evidence remains inadmissible whether challenged or not ...
- E The learned Magistrate in imputing her knowledge in her Ruling from another trial (Criminal Case 82-03-2009 (BTU)) involving the appellant is clearly wrong in law as this evidence is not admissible in law being highly prejudicial of the appellant.
- F 9. Lastly it is contended by learned counsel for the appellant that there has been a complete absence of independent corroboration other than the discredited corroborative evidence forthcoming from the respondent to bolster their case against the appellant.
- G [26] Had the learned Magistrate directed herself properly and correctly as to the need for independent corroborative evidence to enhance the corroborative evidence adduced which have all been discredited as aforesaid *inter alia* PW4 contradicting PW5's evidence to implicate the appellant as guilty of the charge, it is doubtful the appellant would have been convicted. Furthermore,
- H the learned Magistrate had also failed to sufficiently warn herself under the circumstance as to the risk of convicting without such independent corroboration in her ruling as required by the Privy Council in *Chiu Nang Hong v. Public Prosecutor (supra)*. The court will find that there has been a misdirection which has occasioned
- I a failure of justice which justifies the setting aside of the conviction of the appellant. Grounds 2(b) and 2(e) of the petition of appeal are all also made out.

**Defence Witnesses****A**

[27] Learned counsel for the appellant submitted that the learned Magistrate failed to take into consideration at all the evidence given by the appellant, the evidence given by DW1 (Teacher), DW3 (Teacher) and DW4 (Headmaster) who supported the appellant's evidence.

**B**

[28] In view that these are findings of facts based on the learned Magistrate's assessment of the demeanour and veracity of these witnesses before her, this court will be slow to interfere with her judgment on this. The appellant had not shown that there has been manifest error or wrongful exclusion in her assessment and discounting of this evidence adduced for the appellant's defence.

**C**

[29] The court would find that Ground 2(c) of the petition is not made out.

**D****Conclusion**

[30] For the reasons stated above on Grounds (b), (e) and (f) the conviction of the appellant is not right and unsafe and ought to be set aside with the result that the appellant is acquitted of the charge.

**E****F****G****H****I**